Supreme Court, U.S.
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No. 97-1532

In The

Supreme Court of the United States

October Term, 1997

LaRUE T. CAMP and LORI WINKLER f/k/a LORI WEBB,

Petitioners,

vs.

SANDRA D. RILEY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

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Appendix A — Order Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Rehearing 1a

STATEMENT OF THE CASE

A. Course of Proceedings and Dispositions Below

Respondent Sandra D. Riley brought a complaint (R1-1) under 42 U.S.C. § 1983 against Petitioners LaRue Camp and Lori Winkler, f/k/a Lori Webb, two employees of the Jasper County, Georgia, Department of Family and Children Services, alleging (1) that with deliberate indifference they took her fifteen year old daughter Rena into their custody without affording her notice and an opportunity for hearing even though both were practicable; (2) that thereafter they deliberately denied her visitation with her child without lawful authority; and (3) that with deliberate indifference they failed to properly care for and supervise her daughter while in their care which resulted in her daughter's becoming pregnant and marrying, which event destroyed the parent-child relationship, all in contravention of the substantive and procedural due process rights guaranteed to her by the Fourteenth Amendment to the United States Constitution. She also alleged a state law claim for loss of her child's society and services.

Petitioners filed answers (R1-3 and R1-4) and thereafter moved the District Court to dismiss the case for lack of subject matter jurisdiction, (R1-5), which motion the court denied. (Rl-14). Following discovery Petitioners filed a motion for summary judgment which the District Court denied. (R2-56). Petitioner then filed a notice of appeal. (R2-57).

On the first appeal to the United States Court of Appeals for the Eleventh Circuit Petitioners and Respondent fully argued and briefed the issues of qualified immunity, subject matter jurisdiction, and the sufficiency of issues of material fact to support findings of the violation of Respondent's substantive and procedural due process rights under all theories alleged in the complaint. (*See* Brief of Petitioners, Brief of Appellee, Respondent's Statutory Addendum, and Reply Brief of Petitioners in Appeal No. 92-8798 in the Eleventh Circuit). The Eleventh Circuit, without opinion,

affirmed the denial of summary judgment. Petitioners filed a suggestion of rehearing *en banc*, which the Eleventh Circuit denied. (*See* Respondent's Appendix "R. App." 1-2). Petitioners did not file a petition for a writ of certiorari with this Court.

Upon remand a pre-trial order was entered by the District Court (R3-60) in which Petitioners submitted a proposed form for a verdict on special interrogatories which included the question which they now complain should not have been decided by the jury. (R3-60-Attachment "I"). Respondent included in the pre-trial order an additional state law claim for the intentional infliction of emotional distress. The case proceeded to trial before a jury. (R6, R7, R8, R9, R10, R11). At the conclusion of the Respondent's evidence (R8-707-10) and again at the conclusion of all of the evidence (R10-1248-53) the Petitioners moved for judgment as a matter of law under Fed. R. Civ. P. 50 on certain specified grounds. The District Court denied the first motion (R10-710) and deferred ruling on the second (R10-1253-64; R11-1379-84) until the parties were able to submit briefs. The jury rendered a verdict as to liability on special interrogatories in favor of Respondent and against Petitioners on all issues except whether Petitioner Camp had denied Respondent visitation with her daughter (R3-69), and a general verdict as to damages (R3-70) in favor of Respondent for $100,000 compensatory damages and $500,000 punitive damages. After briefs were submitted on Petitioners' pre-verdict Rule 50 Motion, (*See* R3-72; R4-73) the court denied the same (R4-74) and entered judgment in favor of Respondent on the jury verdicts. (R4-75). Thereafter, Petitioners moved once again for judgment as a matter of law pursuant to Rule 50 and in the alternative moved for a new trial or remittitur. (R4-76). The parties submitted briefs (R4-76; R5-81, 85) and after due consideration the District Court denied Petitioners' motions. (R5-87). Petitioners then appealed to the Eleventh Circuit (R5-89), which upheld the verdict and denied rehearing *en banc*. Petitioners then filed the instant Petition.

B. Statement of Facts

The facts presented at trial were in most respects identical to those developed in the record before the first appeal to the Eleventh Circuit. In some instances the facts were much more favorable to Respondent's position and unfavorable to Petitioners'. Because Petitioners fail to set forth most of the operative facts, a brief synopsis is set forth below.

Respondent Sandra D. Riley ("Riley") is the mother of Regina Rena Landress Westbrook ("Rena"), who at the time of the incidents giving rise to the complaint was a fifteen year old ninth grade student, and was in Riley's custody. Rena was dating Billy Westbrook ("Billy"), a senior in high school, who was an eighteen year old adult. Billy is the son of James Westbrook, a Jasper County, Georgia, Commissioner, and of Louise Westbrook, his wife. (R6-105-6; R9-901, 904).

Appellant LaRue Camp was the director of the Jasper County Department of Family and Children Services ("DFACS"), a county branch of the Georgia Department of Human Resources. (R7-451). As a result of her position, she knew and had business dealings with James Westbrook. (R7-452, 459; R9-902). She was the supervisor of Respondent Lori Winkler, a Senior Caseworker, and another Senior Caseworker, Carolyn Williams. (R7-262-63, 458-59). Winkler, who was then known by her maiden name Lori Webb, was unmarried, did not have children, and had worked for DFACS for about eight months. (R10-1143-44). The Jasper County DFACS is funded by the State of Georgia. However, a salary supplement is provided to the DFACS workers by Jasper County. (R7-451-2; R9-902).

In March 1988, Riley became concerned that her daughter Rena was seeing too much of Billy on a social basis and that the relationship might become too intimate. Therefore, she had forbidden Rena to date Billy on the evenings during the school week. (R6-108-12).

Notwithstanding this lawful parental command, on Tuesday, March 15, 1988, Rena, who had been late to school that day, disobeyed her mother, surreptitiously left home, and went out on a date with Billy. Both Billy and Rena knew that they were not supposed to be out on the night in question. Both expected that they would get in trouble because of it. (R8-607-9; R9-857). In addition, Billy and Rena had been smoking cigarettes, which Billy knew was forbidden, as did Rena. (R7-108). When Rena returned late that night she was spanked by Riley, her mother, for her disobedience. (R6-110). A spanking was a rare occurrence. (R9-846, 857).

The spanking did not injure Rena and, it may be inferred, was reasonably adjusted to her age and size. (R6-110, 121-23; R7-433). In fact, spankings of the same or greater severity have been specifically approved by the Georgia Court of Appeals for administration by school principals to pupils. (*See* R10-1076-78; O.C.G.A. § 20-2-730, *et seq.*; *Maddox v. Boutwell*, 176 Ga. App. 492, 336 S.E. 2d 599 (1985); and *Mathis v. Berrin County School District*, 190 Ga. App. 255, 378 S.E. 2d 505 (1988)). In fact, Rena had been paddled at school previously that same school year, (R9-862-63), and Betty Wrights-Robinson, one of Petitioners' expert witnesses, testified at trial that bruising is an expected consequence of paddling. (R10-1077, 1079-81).

Rena did not cry when she was spanked. (R9-858). At that time she told Riley that "that's as good as [she] want[ed]." (R6-122). Afterwards, she went to her room. (R6-123). She told her sister, Carey Landress, that she was all right, and that she just wanted to leave their home. (R6-122, R8-679, R9-858).

The next day Billy took Rena to school. Rena continued to live at home and attended school that entire week without incident. (R6-125-28; R7-449-50; R8-609-10, 679). On that weekend, she visited in the home of Susan Bell, one of her close friends, and then returned home on Sunday. (R6-127-28).

On Monday, March 21, 1988, Winkler received an *anonymous* telephone call from a female. The anonymous caller stated that Rena had been "beaten" and referred Winkler to Louise Westbrook, Billy's mother, (R-Exhibits, P-19/J-19, entry for 03/21/88), who related to Winkler certain hearsay information which she had heard in regard to the spanking as well as certain other hearsay, or more accurately rumor, in regard to Riley. (*See* R-Exhibits, P-19/J-19, entry for 3/21/88).

Louise Westbrook had encouraged Billy to date Rena. Billy had mentioned to her he might like to marry Rena. (R9-916). James Westbrook thought that Billy was hunting a wife and might marry Rena. Through his comments he encouraged Billy and Rena to think of marriage. (R8-605-7; R9-862, 905). Billy's sister had married at age 14, and his mother had married at age 16 or 17. (R8-604).

Thereafter on March 21, Winkler and her associate Carolyn Williams went to the Jasper County High School and interviewed Rena while she was in gym class. Rena later told Billy that Winkler and Williams had come to take photographs. (R8616). However, Petitioners testified that no photographs were ever taken. DFACS' standard procedure requires that such photographs be taken. (R7-362, 494; R9-828, 899; R10-1084).

During the March 21, discussion with Rena, Winkler explained to her about foster care. Rena told Winkler and Williams that she did not want to be placed in foster care. They then explained to Rena the process of a juvenile complaint, including the fact that they were mandated by law to go and talk with her mother. (R-Exhibits, P-19/J-19, Entry for 4/23/88; R7-355). Winkler admitted that no emergency situation existed at that time. (R7-355-56).

Immediately following their interview of Rena, Winkler and Williams went to Riley's home, but she was not there. They then called Rena and told her not to mention their interview of her to

her mother because they had not yet gotten in touch with her. (R-Exhibits, P-19/J-19, Entry 3/21/88; R7-365-66).

Thereafter, on the afternoon of March 21, Billy came into the DFACS office and talked with Winkler and Camp. He repeated what Rena had previously told Winkler. He asked the Petitioners to "hold off" before talking with Riley. Winkler and Camp agreed to this improper request. (R-Exhibits, P-19/J-19, Entry 03/21/88; R7-366-67, 447-48; R8-611-15).

Rena spent the night of Monday, March 21-22, 1988, safely at home with Riley. Linda Doster, one of Petitioners' expert witnesses, testified at trial that "it [was] apparent that Rena was safe if her mother that night [*sic*] — to spend another night in the home of her birth mother until the agency could more fully assess the risk to the child." (R10-1050).

On the next morning, March 22, Billy and Rena went to the DFACS office. Rena admitted at trial that Billy wanted her to go into foster care and that she wanted to please him. (R9-867). Rena told Winkler that she wanted to go into foster care, not because she was afraid of her mother *per se*, but because she was unsure of what her mother's reaction would be if Winkler visited with her. Winkler discussed this request with Camp; and they decided to take Rena into foster care at that time, which was approximately 10:00 A.M. (R-Exhibits, P-19/J-19, Entry 3/22/88; R9-865-66).

The only so called "investigation" made by Winkler and Camp before they took Rena into their custody was to talk to Louise Westbrook, Billy Westbrook's mother and wife of James Westbrook, a Jasper County Commissioner, whose vote controlled in part a portion of their compensation; to talk to Rena who was angry at her mother; and to talk to Billy Westbrook, with whom Rena had been planning how they could get married without Riley's permission. Petitioners spoke with no others. They failed to talk to any school teachers, school counselors, or the like. They did not interview Riley, did not interview Riley's husband, did not

interview Rena's sister, or any of Rena's friends. They did not take any pictures of Rena, nor did they have Rena examined by a physician. They did not try to discover whether or not there was any truth to the stories which Louise Westbrook told about Riley. (R-Exhibits, P-19/J-19, Entries 03/21/88 and 03/22/88; R10-1087). If Petitioners had asked Rena about one of the rumors Louise Westbrook told Winkler about Riley, she would have discovered that the rumor was untrue. (R9-863). Instead, it may be inferred, it was Petitioners' policy to do no investigation, but merely to believe the child. Winkler testified, "It's the policy of DFACS to believe the children. . . ." (R7-353).

There was ample evidence from which the jury could conclude, as it did, that Petitioners did not obtain a court order before they took Rena into their custody at 10:00 A.M. on March 22, 1988. The official "Juvenile Complaint Form," (R-Exhibits, P-14/J-14), which was filled out by Winkler, indicates that a detention order was received from *Judge Hugh Thompson* at 3:00 P.M. on March 22, 1988, *some five hours after Rena was detained* at 10:00 A.M. and after Riley was first contacted at 10:00 A.M. (R7-275-81; R-Exhibits, P-3 and P-14/J-14).

Moreover, there was substantial evidence that *no order* was *ever obtained* from Judge Hugh Thompson or any other Judge on March 22, 1988. Phillip Spivey, DFACS' attorney for Rena's case, in his first affidavit filed in the District Court, signed June 1, 1990, (R-Exhibits, P-21) stated that he got a verbal shelter care order from *Judge William Prior*, who was in Eatonton, Georgia, on the day in question. (R8-586). However, in a second affidavit signed November 22, 1991, and filed in the District Court after discovery was completed, (R-Exhibits, P-22) , he alleged the order was from *Judge Hugh Thompson*, who usually sits in Milledgeville, Georgia. As shown by Spivey's letterhead (R-Exhibits P-38), Spivey's office is in Milledgeville. Curiously, he also stated in his *second* affidavit that "on that same day (03/22/88) a written order signed by Judge William A. Prior was entered to memorialize the verbal order." However, Spivey's own time records attached to his second affidavit

did not reflect any outside conference with Judge Prior, and his telephone records showed no telephone calls to Eatonton, Georgia on March 22, 1988, where Judge Prior was. Moreover, the written shelter care order, which eventually was signed by Judge Prior and then filed, was not signed and filed until March 24, 1988 (R-Exhibits, P-6/J-6) and the date of March 22, 1988, thereon was put there by Spivey, not by Judge Prior. (R8-581-82; R9-743). At trial, Spivey tried to explain these conflicting statements under oath as "errors." (R9-743, 749, 775). Moreover, Judge Thompson testified that he did not recall giving a verbal shelter care order to Spivey (R8-535) and that he consulted his log and found no entries concerning the case of Rena Landress. (R8-537). He also said that he could not recall the facts of Rena's case ever being related to him and that he did not recall speaking to Spivey in regard to the case at all. (R8-540). Judge Thompson testified it is customary within his judicial circuit to have the same judge who issued a verbal shelter care order also sign the written shelter care order. (R8-545). This fact was also confirmed by Judge Prior. (R8-582).

Nevertheless Spivey testified at trial that he received a verbal order from Judge Thompson, contrary to his first affidavit. (R-Exhibits, P-21). Spivey also admitted he had Judge Prior sign the written Shelter Care Order two (2) days later and that he, Spivey, inserted the date of March 22, 1988, thereon. This, however, contradicted Spivey's second affidavit. (R-Exhibits, P-22). Moreover, there was ample evidence solicited during the cross-examination of Spivey to lead reasonable jurors to reach the conclusion that Spivey could not have known Riley's middle name on March 22, 1988, although his time sheet for that date contained her name. (R9-797-99, 809-10). From that cross-examination it may be inferred that Spivey altered his time sheets after the fact to conform to what he *wished* the evidence were, rather than what it actually was, and that he never had obtained any order on March 22, 1988, in regard to Rena.

Further, Spivey testified he told Carolyn Williams that he had received a verbal order to detain Rena. (R9-740). Carolyn Williams

testified that Spivey never told her he had received a verbal order (R10-1213, 1217-18), and that she did not know if one was ever obtained from Judge Thompson. (R10-1212). Camp testified that it had to be either Winkler or Williams who talked to Spivey, that Spivey never told her that he had received an order, that she had no present recollection of Winkler's telling her that she had received an order, and that Camp herself did not speak to either Judge Thompson or Judge Prior. (R10-1129-32). Winkler stated that she had no independent recollection that Spivey ever told her he had received a verbal order. (R10-1147, 1163). She further said she never talked with any judge herself. (R10-1147, 1163).

In stark contrast to the testimony of the state officials, Riley testified to her vivid recollection that she specifically asked Winkler if she had an order when Winkler first informed her that Rena was in DFACS' custody, and that Winkler stated she did not, but could get one. (R6-131-33). Riley testified to the confirmation of this lack of an order by Deputy Sheriff Tillman, who had accompanied Winkler and who said in essence that that was correct, but that the Judge was in Eatonton, (R6-131-33), which was where Judge Prior was on that day. (R8-586). Therefore, the jury certainly was authorized to conclude, as it did, from this contradictory testimony that *no* order was obtained to take Rena from Riley's custody before Judge Prior entered his detention order on March 24, 1988, when a hearing was finally held, even though Spivey, at the beginning of the March 24 detention hearing, told Judge Prior he had previously obtained a verbal order from Judge Thompson. (R10-1178). Thus, Petitioners' taking of Rena was not a discretionary act, but was done completely without authority as Georgia law does not allow social workers to take children into custody without a court order. *See* O.C.G.A § 15-11-17.

Thereafter, it may be inferred from the evidence, Winkler changed the *official* DFACS record in regard to this incident to make it appear that an order had been obtained prior to Rena's being taken into foster care. There was sufficient evidence for the jury to conclude that the page of the official case record in which

the taking is noted had been materially altered or replaced and that Winkler had to be the responsible party because the official record is in Winkler's own handwriting. (R-Exhibits, P-19/J-19, Entry 3/22/88; *See* R7-270-71, 285-88). Moreover, there was evidence of other tampering with the official DFACS' record by Winkler. (*See* R-Exhibits, P-19/J-19; R7-304-10, 320-23, 333-23, 333-35, 369-70, 390-91; R10-1127-29).

Further, Winkler admitted intentionally altering the copy of the case file which she gave to Riley in order to pervert the truth, even though she knew it was unethical to do so. (R7-307-9, 320-22). She testified that she did so at the direction of Camp, which Camp denied. (R7-307, 320, 476-77). Pages appear to be missing from significant parts of *official* DFACS record in regard to Rena. (*Compare* R-Exhibits, P-17, P-19/J-19; R7-270-71, 284-88, 303-10, 320-23, 390-94, 417-18). There was credible evidence that Winkler was responsible for these omissions, particularly since all of the "contact sheets" in the case record appear to be in her handwriting. (*See* R-Exhibits, P-19/J-19; R-270-71). The only handwriting both before and after the missing page on the entries for March 22, 1988, is that of Winkler. Thus, all of Winkler's testimony was suspect, as was that of Camp.

It appears clear that the actions of Camp and Winkler violated the procedures required by Title 15 of the Official Code of Georgia Annotated and the rules and regulations of the Division of Family and Children Services of the Georgia Department Human Resources, and in particular Chapter 21 of the Family and Children Services Social Service Manual, all of which existed for the protection not only of Rena, but also for the protection of the familial relationship between Riley and Rena. (R7-397-9; R7-462-71, 477-78, 485-86, 499-510; R10-1139-40). At the time of the taking Petitioners' own procedures required them to discuss the situation with Riley prior to the taking of the minor child, and they were aware of these procedures. (R7-499-506).

There was more than sufficient evidence for the jury to conclude, as it did, that Petitioners were deliberately indifferent to

the discharge of their duty to give Riley notice and opportunity for hearing before depriving her of any interest in the care and custody of her minor child. Both notice and a predeprivation hearing were practicable in this case. Winkler admitted there was no problem with neglect, the home, or lack of supervision, nor was there sexual abuse. (R10-1186-88).

At about 10:00 A.M., on March 22, shortly after Winkler and Camp had taken Rena into their custody and control, without a court order and without pre-deprivation notice or hearing, Winkler went to Riley's home where she informed her that they had taken Rena and demanded that she give them Rena's clothing. Riley became extremely distraught when informed of the taking of her child without notice and hearing. (R-Exhibits, P-19/J-19, Entries for 03/22/88; R6-130-33).

On the afternoon of March 22, Rena and Billy came back to the DFACS office; and Rena told Winkler that her friend Julie Lewis, with whom Billy and Rena had previously doubled-dated, had talked with her parents who had said that they would keep Rena. Thereafter, Winkler placed Rena in the Lewises' home. The Lewises' home was not a state approved foster home, nor was it a home that met the requirements of O.C.G.A. § 15-11-20, which Petitioners knew or should have known they were required to follow. (O.C.C.A. § 15-11-20; R-Exhibits, P-19/J-19, Entry 3/22/88; R7-384, 386; R8-653).

As noted above, a shelter care order was eventually signed by Judge William Prior and was filed on March 24, 1988. *Williams could not remember any other similar cases in which a child was taken without prior parental notification.* (R10-1216).

Also, on March 24 1988, a detention hearing was held before Judge Prior, which was attended by Riley, her husband, and their attorney. Spivey lied and told Judge Prior that Judge Thompson had given a verbal shelter care order. (R10-1178). Winkler lied and testified that she had talked to other witnesses including

neighbors, friends, and family members (even though she had only spoken with Billy and his mother), and that they gave no indication Rena had been a behavior problem for Riley. (R10-1190-91). After hearing these lies by Spivey and Winkler, Judge Prior entered a form detention order. (R-Exhibits, P-19/J-19, Entry 3/24/88; R8-580-81).

There was substantial evidence that while under the custody and control of Camp and Winkler, Rena was deprived of adequate and proper care and control due to Petitioners' deliberate indifference and intentional disregard of their duties. For example, while in foster care Billy spent time with Rena almost every day. (R8-640-45). Rena worked at Billy's parents' cabinet shop. (R7-413). Billy and Rena opened a joint checking account into which Rena's paycheck was placed. (R6-168). No one from DFACS ever asked Rena what she was doing with her paycheck. (R7-412, 413).

While in foster care Winkler told Billy that Rena needed Billy to stay by her because Rena needed someone with whom to talk and whom she could trust other than her mother. (R8-642-45, R9-860). Billy's mother and father encouraged his relationship with Rena. (R9-605-7). He and Rena had sexual intercourse "pretty often." (R8-647). They had sex on his parents' property during the week and while Rena worked at Billy's parents' cabinet shop. (R8-658). Billy told Camp and Winkler of his and Rena's plans to get married. (R8-659). Camp and Winkler never expressed any concern about Billy and Rena's association at the cabinet shop. Winkler never put any limits on Rena's seeing Billy, (R8-642), even though DFACS was responsible for the limits placed on Rena. (*See* O.C.C.A. §§ 49-5-13(12), 49-5-12(j)).

After about two (2) weeks, at Rena's request and without any investigation of Rena's complaints, Winkler moved Rena from what may be inferred to be the relatively strict confines of the Lewis residence to the Bell residence, home of Susan Bell, with whom she and Billy had double-dated (R8-624), with whom she had spent the weekend prior to being taken by Petitioners (R6-127-

28), and with whom she had discussed going into foster care before she was taken by Petitioners. (R9-848-49, 872, 885). The Bell home was not a state-approved foster home, nor did it meet the requirements of O.C.G.A. § 15-11-20. (R7-385, 397, 462-64). Rena admitted Susan Bell, who at trial repeatedly referred to Riley as "Sandy," (R9-937), was able to evade the rules at her parents' home. Indeed, Billy and Rena were late returning to the Bell's house on at least one occasion, but Rena was not disciplined for it. (R9-28).

Further, there was substantial evidence that Billy and Rena were able to spend much more time together while she was in foster care, than had been the case at Riley's household. (R9-847-48, R8-642-46, 648). At Rena's request Winkler moved Rena from the Lewises' despite warnings from Riley that Billy and Rena were merely using the system in order to spend more time together. (R7-356, 372; R9-788). Winkler ignored the same, ("[T]here was no reason for me to believe what Mrs. Riley was saying at all.") (R7-372), and did not warn the Bells about Riley's concern that Billy and Rena might be planning to get married. Winkler and Camp moved Rena without following their own procedures which required them to inform both Riley and the Lewises in advance. (R7-398, 468-70). Petitioners never considered placing her in her aunt's home, even though they were aware the aunt wanted to keep her. (R10-1130). Eventually Winkler, (having previously denied Rena's sister Carey the right to see her or visit with her (R8-682-83)), also denied Riley visitation rights at Rena's request because Rena said that she was tired of her mother's lies about her and Billy's relationship, even though Riley's parental rights had not been terminated. (*See* R-Exhibits, P-19/J-19, Entry of 04/14/88, FV/OV; R7-400, 404). Incredibly, DFACS attorney, Philip Spivey, wrote Riley's attorney a letter complaining of Riley's investigation of Rena and Billy's activities and Riley's concern about their possible wedding plans, and telling her attorney that her concerns were "*irrelevant theories*." (*See* R-Exhibits, 38; R9-782-86). All the while, it is apparent from the evidence, Rena and Billy were allowed to do as they pleased by Petitioners, apparently because Winkler "trusted Rena's judgment." (R8-642-45).

While Rena was in Petitioners' custody, one or both of them told her that Riley was not cooperating with DFACS, and told her that one of the reasons she could not go home was that her mother was not doing what they requested of her. Winkler admitted she kept Rena fully informed of the progress of the case. (R7-428-29; R9-680). Petitioners also kept Billy informed of the progress of the case and discussed with him how visits between Riley and Rena had gone. Billy and Rena discussed the case often. (R8-630-34, 640). Camp and Winkler sought Billy's advice a number of times during the progress of the case and asked his opinion as to whether or not Rena should be moved to the Bells', a subject which he and Rena had previously discussed. (R8-638, 639). Riley warned Camp and Winkler that Rena was in danger by and through Rena's association with Billy, an adult, and that she feared for the moral welfare of Rena. (R7-441). However, either Winkler failed to note any of these warnings on the "contact sheets" in the official DFACS record, or she changed the same to delete those warnings, because it is undisputed that the "contact sheets" contain no reference to the warnings, but that Winkler knew of them. (R7-220, 296; R-Exhibits, P-16 and P-19/J-19). At no time while Rena was in the care and custody of Camp and Winkler was Rena placed in any of the following:

> (1) A licensed foster home or a home approved by the court which may be a public or private home or the home of the non-custodial parent or of a relative;
>
> (2) A facility operated by a licensed child welfare agency; or
>
> (3) A shelter care facility operated by the court;

despite the fact that O.C.C.A. § 15-11-20 required her placement in one of those places. (R7-384, 386, 397; O.C.G.A. § 15-11-20). Also while in foster care Rena was never grounded, restricted, or reprimanded by anybody. (R9-859). Billy testified neither the Bells nor the Lewises ever checked up on what Rena

did in her spare time. (R6-646). Rena admitted she was left "to her own devices." (R9-868).

While in DFACS' custody Rena was represented by her *guardian ad litem*, Dan Roberts, Esq., who also represented the Jasper County Commission on which Billy's father sat. He apparently did nothing but convey Rena's wishes to the Court. (R7-405-10; R10-1195, 1198-99).

Under Georgia law a "deprived child" is one who is "without proper parental care or control, assistance, education as required by law, *or other care or control necessary for his physical mental or emotional health or morals.*" (O.C.G.A. § 15-11-2(8)(A), *emphasis supplied.*) While in the exclusive care and custody of Camp and Winkler, Rena Landress became pregnant and, it may be inferred, became a deprived child as defined by O.C.G.A. § 15-11-2(8)(A). (*See* R-Exhibits, P-19/J-19, *passim*).

Despite the fact that Riley warned Camp and Winkler of sufficient facts to make them reasonably believe that Billy was violating O.C.G.A. § 16-12-1 by contributing to the delinquency, unruliness or deprivation of Rena, and was violating O.C.G.A. § 16-6-18, which prohibits the offense of fornication, they never discussed Riley's concerns with Rena and Billy. (R7-444, 445, 465; R8-644, 649; R9-861), nor did they discuss with Rena Riley's allegation that Rena and Billy were skipping school together. (R9-861).

On April 14, 1988, Camp and Winkler, without any hearing or court order, unilaterally discontinued visits between Riley and her daughter Rena until after a hearing scheduled for April 26, 1988. (R-Exhibits, P-19/J-19, Entry 4/14/88, Entry 4/18/88; R7-400-4; R9-871).

Rena became pregnant in May or June of 1988, while in the custody and control of Camp and Winkler, by Billy, an adult. It may be inferred Rena had stopped using birth control while in

foster care (R9-957), and became pregnant intentionally because she feared being in foster care until she was 18 due to the fact that Winkler kept telling her that Riley would not "cooperate" with DFACS. (R-Exhibits, P-19/J-19, Entry 6/11/88; R9-853-54).

After they found out she was pregnant, neither Winkler nor Camp tried to discourage Rena from getting married, (R9-853), even though she was still in their care. Rather, they allowed her to move in with Billy's family until the marriage took place. (R9-853-54).

As a result of Rena's pregnancy, the Judge of the Probate Court of Jasper County married Rena and Billy on June 11, 1988, while Rena was still in the custody and control of Camp and Winkler. (R-Exhibits, P-19/J-19, Entry 6/11/88; R9-853-54).

As a result of the marriage of Rena to Billy, Riley lost her parental power over her minor child, who by her marriage became emancipated. Riley thereby was permanently deprived of her liberty interest in the custody and control of said child and her right to the services and society of the child during the child's minority. (O.C.G.A. § 19-7-1; *Street v. Cobb County School Dist.*, 520 F. Supp. 1170, 1172 (N.D. Ga. 1981)).

REASONS FOR DENYING THE WRIT

Because the Eleventh Circuit Court of Appeals below decided the case properly, and because none of the alleged errors sought to be reviewed by the Petition would change the result, the Court should deny the writ.

I. THE GRANTING OF THE PETITION WOULD BE USELESS AND A WASTE OF JUDICIAL RESOURCES AS THE JUDGMENT AWARDED DAMAGES ON PROPERLY SUPPORTED CLAIMS WHICH ARE NOT THE SUBJECT OF THE PETITION.

Petitioners seek the Court to grant a writ of certiorari to review whether or not Respondent had a substantive due process right to family integrity which was violated by Petitioners, to review the jury's authority to make a determination in regard to substantive due process violations, and to review the refusal of the Eleventh Circuit under the "law of the case" doctrine to review once again the defense of qualified immunity. Those are the only issues sought to be reviewed. However, even if the Court were to find that the Eleventh Circuit erred in deciding those issues, the Court would still not be able to reverse the judgment below. Therefore, the granting of the Petition would be a useless and futile act, and the Court should deny the same.

At trial Respondent sought and obtained relief for denial of both her substantive and procedural due process rights by Petitioners when they removed Rena from her custody without predeprivation notice or hearing when such was practicable, *i.e.*, in the absence of an emergency, and without a court order as required by Georgia law. (*See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982); *Fetner v. City of Roanoke*, 813 F.2d 1183, 1186 (11th Cir. 1987); *Zinermon v. Burch*, 494 U.S. 113 (1990); *Burch v. Apalachee Community Mental Health Serv.*, 840 F.2d 797 (11th Cir. 1988); *Bendiburg v. Dempsey*, 707 F. Supp. 1318 (N.D. Ga. 1989), *affirmed*, 909 F.2d 463 (11th Cir. 1990)). She sought against both Petitioners and received relief against Petitioner Winkler for the denial of her substantive and procedural due process rights when she was unilaterally denied visitation with her child. (*See In the Interest of K. B.*, 188 Ga. App. 199, 200, 372 S.E. 2d 476 (1988); *cf. Santosky v. Kramer*, 455 U.S. 745, 753 (1981)). She sought and received relief against both Petitioners for the denial of both her substantive and procedural due process

rights because of the Petitioners' deliberate indifference and intentional misconduct in the care and supervision of Rena, which resulted in Rena's becoming pregnant and marrying while in Petitioners' care, thus permanently depriving Respondent of her liberty interest in the care, custody, control, society, and services of her child. (*See Santosky v. Kramer, supra; M.L.B. v. S.L.J.*, __ U.S. __, __, 117 S.Ct. 555, 564-65, 136 L.Ed.2d 473 (1996); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Taylor by and through Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987)). Further, she sought and received relief under Georgia law against Petitioners for their unlawful interference with and destruction of her right to the custody and control of her minor child, thereby depriving her of the society and services of her minor child in violation of the duties created by O.C.G.A. §§ 19-7-1, 16-5-45, 51-1-1, 51-1-6, 51-1-8. Finally, she sought and received relief against Petitioners under Georgia law for their malicious, willful, wanton, and intention infliction of emotional distress upon her. (R3-60).

All of the foregoing issues were submitted to the jury upon special interrogatories, (R3-69) with a general verdict being used for damages. (R3-70). Because the jury's general verdict was supported by theories other than those sought to be reviewed by the Petition, it must be upheld even if the grounds sought to be reviewed by the Petition were to be sustained by this Court. "A general verdict will be upheld if it is supported by one of a number of the theories upon which the case is submitted to the jury." *Geneva County Board of Education v. CNA Ins. Co.*, 874 F.2d 1491, 1497 (11th Cir. 1989) (Special interrogatories as to liability and a general verdict as to damages used). Even Judge Tjoflat in his dissent from the denial of rehearing *en banc* in Petitioners' second appeal recognized that "[t]he jury did not differentiate among the . . . claims, nor did the court's judgment. Hence, the judgment awarded the plaintiff $600,000 on each of her claims." (Petitioners' Appendix "P. App." 7a). Thus, because Respondent was awarded $600,000 on both of her state law claims, review of which is not sought by the Petition, the granting of the Petition would be useless

because even if the Court found merit to one or more of the issues Petitioners seek to raise, the Court could not reverse the judgment below. Therefore, the Petition must be denied.

II. THE FAILURE OF PETITIONERS TO PETITION FOR A WRIT OF CERTIORARI AFTER THEIR FIRST APPEAL TO THE ELEVENTH CIRCUIT PRECLUDES THEM FROM NOW ARGUING THAT RESPONDENT'S CONSTITUTIONAL RIGHTS WERE NOT CLEARLY ESTABLISHED.

In their first appeal to the Eleventh Circuit Petitioners argued at length that Respondent's constitutional rights for the violation of which she brought her complaint were not clearly established, and therefore Petitioners were entitled to qualified immunity. The Eleventh Circuit's affirmance of the District Courts' denial of summary judgment to Petitioners in effect held that Respondent's constitutional rights were clearly established. (*See* the reasoning of Judge Birch at P. App. 55a-56a, including footnote 6). If Petitioners had disagreed with this conclusion, it was incumbent upon them to petition this Court for a writ of certiorari at that time. However, this they failed to do. Because they failed to do so, the determination that Respondent's rights were clearly established became the "law of the case." Therefore, Petitioners may not now argue that Respondent's rights were not clearly established for the purposes of this case.[1]

1. It should be noted parenthetically that any other result would be extremely unfair to Respondent who has had to bear the expense of a trial which now Petitioners claim should not have taken place, but which they allowed to take place without seeking review of their contentions by this Court in their first appeal. Indeed this is one of the evils which the defense of qualified immunity is supposed to prevent from occurring. Certainly the doctrine which in this case allowed an immediate appeal from the denial of a qualified immunity defense should protect the Respondent from being required to go to trial after appeal only to find that her rights were not "clearly established" on a second appeal. Such a "second bite at the apple" would be inherently unfair to all 42 U.S.C. § 1983 plaintiffs.

> "The doctrine [of the law of the case] embodies a salutatory rule of practice that when a Federal Appellate Court has established a rule of law for the case at bar it will not, on a successive appeal, depart therefrom in deciding the same issue, except for cogent reasons." 1-A Moore Federal Practice para. 0.404[10] (2d Ed.).

Lumbermen's Mutual Casualty Co. v. Wright, 322 F.2d 759, 763 (5th Cir. 1963). *See generally Wheeler v. City of Pleasant Grove,* 746 F.2d 1437, 1440 (11th Cir. 1984). While the doctrine does not bar reconsideration of an issue if a subsequent trial produces substantially different evidence, controlling authority has changed, or a prior decision was clearly erroneous and would work manifest injustice, *see Wheeler, supra,* none of those conditions apply here.

Moreover, Petitioners seek the writ of certiorari to correct alleged errors in regard to substantive due process and qualified immunity. They do not seek a review of the jury's findings, which were affirmed by the Eleventh Circuit, in regard to procedural due process violations and state law claims. As their failure to petition for a writ of certiorari in their first appeal now precludes them from arguing that Respondent's substantive due process rights were not clearly established, or from now claiming a conflict between the circuits in that regard, the only issue possibly remaining is the second prong of the qualified immunity defense, which involves whether or not the actions of Petitioners actually violated Respondents' clearly established constitutional rights. As will be seen below, because that issue is also precluded by the law of the case rule, the Court must deny the Petition.

III. RESPONDENT'S SUBSTANTIVE DUE PROCESS CLAIMS FOR DESTRUCTION OF THE FAMILIAL RELATIONSHIP WERE MERITORIOUS AND SUPPORTED BY SUBSTANTIAL EVIDENCE.

While Petitioners go to great lengths to try create a conflict between the circuits in regard to the existence *vel non* of a substantive due process right to family integrity and the familial relationship, they do so by ignoring the fact that here Respondent's allegations went beyond contending that Petitioners failed to protect her child from harm inflicted by another, in this case the adult Billy Westbrook. While this contention was made, Respondent also contended that such was merely part and parcel of Petitioners' deliberate indifference and intentional misconduct which affirmatively interfered with and destroyed her constitutionally protected liberty interest in her relationship with her daughter. In other words, Respondent contended and proved that Petitioners actively failed in their duty to supervise and care for Rena while in their custody.

Petitioners' actions went beyond mere non-feasance to active malfeasance. They actively encouraged the relationship between Billy and Rena. They informed Billy of the progress of the juvenile court case and improperly discussed such matters with him. They told Rena that she could not go home until Respondent obeyed their wishes. They ignored Respondent's warnings that Billy and Rena were using DFACS and the foster care system as a way to get married. They violated their own rules in regard to the placement of Rena in properly approved homes and failed to adequately supervise her in contravention of their duties imposed by law. (*See* O.C.G.A. § 49-5-12(j), *formerly* O.C.G.A. § 49-5-12(1)). Even after Rena's pregnancy was revealed they allowed Rena to move into Billy's parents' home and did nothing to discourage the marriage which destroyed the parent-child relationship. In short, Riley's allegations went far beyond contending that Petitioners merely failed to protect Rena from Billy. In essence Respondent contended that her parental relationship with her child was

terminated by what might be called "civil death" due to the deliberate actions of Petitioners. Petitioners' intentional, or at least deliberately indifferent, actions might be said to have "pointed the gun and pulled the trigger" at Respondent's relationship with her child. *Cf. Bell v. City of Milwaukee,* 746 F.2d 1205 (7th Cir. 1984). Surely Respondent had a right to expect that Petitioners would not deliberately seek to destroy her relationship with her daughter.

Viewed in the light of the facts proven at trial it is obvious that Respondent had clearly established substantive due process rights which were violated by Petitioners. As pointed out by Judge Birch in his concurrence to the denial of rehearing *en banc,*

> the right to family integrity and freedom to rear one's children as one deems fit is also a fundamental right that the Court has recognized for almost one century. *See M.L.B. v. S.L.J.,* ___U.S. __, __, 117 S. Ct. 555, 564-65, 136 L.Ed.2d 473 (1996) (stating that "the Court [has been] unanimously of the view that the 'interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment' ") (quoting *Santosky v. Kramer,* 455 U.S. 745, 774, 102 S.Ct. 1388, 1405, 71 L.Ed.2d 599 (1982) (Rehnquist, J., dissenting)); *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).

(P. App. 73a) Judge Birch recognized that the case was not just about gross misjudgment by Petitioners, but also was

> about gross misuse of the awesome power of the state for the purpose of satisfying the wishes of a politically connected eighteen-year-old man to have access to his under-age girlfriend.

(P. App. 77a). None of the cases cited by Petitioners compel the conclusion that Respondent did not have a fundamental liberty interest protected by substantive due process principles, and none of the cases cited by Petitioners compel the absurd conclusion that she may not recover against those who while acting under color of state law deliberately interfered with and destroyed the parent-child relationship.[2] In short, the case was properly decided below. No real conflict between the circuits exists in regard to a case with these facts. Indeed, Petitioners do not even suggest what "correct rule" they seek to have the Court adopt to correct the so-called "conflict." Therefore, the Petition should be denied.

IV. PETITIONERS MAY NOT NOW COMPLAIN THAT THE JURY WAS ALLOWED TO DETERMINE CONSTITUTIONAL ISSUES, BECAUSE PETITIONERS NOT ONLY ASSISTED IN THE FORMULATION OF THE SPECIAL INTERROGATORIES AND PROPOSED THEMSELVES THE ONES OF WHICH THEY NOW COMPLAIN, BUT THEY MADE NO OBJECTION TO THE SUBMISSION OF THOSE ISSUES TO THE JURY AND MADE NO OBJECTION TO THE INSTRUCTIONS GIVEN TO THE JURY.

Petitioners now complain that the District Court improperly delegated to the jury the authority to determine when governmental conduct violated the substantive due process rights of Respondent. However, Petitioners are precluded from attacking the form of the

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2. Indeed, it is hard to understand Judge Tjoflat's vehement dissent to the denial of rehearing *en banc* because on Petitioners' first appeal Petitioners sought a rehearing *en banc* which was denied because no member of the panel and no judge in regular active service on the court, including Judge Tjoflat himself, requested that the entire court be polled on the request for rehearing. (*See* R. App. 1-2). In fact, it appears that it is not the law of substantive due process which has changed since the first appeal, but it is merely Judge Tjoflat's opinion which has changed.

verdict and the submission of that issue to the jury because they participated in the formulation of the verdict form and failed to object to the same at trial. Further, as they requested themselves that the questions about which they now complain be submitted to the jury (*See Petitioners' portion of Attachment "I" to the Pre-Trial Order* (R3-60)), and failed to object to the form of the verdict or any of the instructions to the jury (R11-1267-78, 1343-46, 1353-59, 1361-63, 1375, 1383), they may not now be heard to complain that these questions were answered by the jury and used as the basis of the judgment. *Cf. Golub v. J. W. Gant & Assoc.*, 863 F.2d 1516, 1521 (11th Cir. 1989) ("objection to the form of interrogatories in a special verdict must be raised before the jury is charged.") *See also Stancill v. McKenzie Tank Lines, Inc.*, 497 F.2d 529, 534-5 (5th Cir. 1974); and *Central Progressive Bank v. Fireman's Fund Insurance Co.*, 658 F.2d 377, 381-2 (5th Cir., Unit A, 1981). Therefore, to the extent that the Petition is based upon objections to the form of the verdict or to the submission of certain issues to the jury, the Petition must be denied.

Moreover, in this case the jury was not asked to define the contours of substantive due process, but merely was asked specific questions which when answered affirmatively met the definition of a violation of substantive due process. Certainly in a case with contested facts this was appropriate. None of the cases cited by Petitioners state that such a process is improper. Indeed, because the jury was the trier of facts, such a process was required. For this additional reason the Petition must be denied.

V. THE APPLICATION OF THE "LAW OF THE CASE" DOCTRINE HERE DOES NOT ESTABLISH A "ONE APPEAL" RULE IN REGARD TO QUALIFIED IMMUNITY.

Petitioners complained that the Eleventh Circuit's application of the "law of the case" doctrine has created a "one appeal" rule in violation of the rule established in *Behrens v. Pelletier*, 516 U.S. 299 (1996). Nothing could be further from the truth. As pointed

out by Judge Kravitch in her opinion on Petitioners' second appeal, (*see particularly* P. App. 58a-65a) a defendant may always raise the defense of qualified immunity at trial even if the defendant has previously appealed a denial of summary judgment on that issue. However, just as it would in regard to any other defense or issue, the "law of the case" doctrine will preclude the successful raising of that defense *if and only if* the facts presented in opposition to the summary judgment motion become "without notable exception, the 'actual facts' as developed at trial. . . ." (P. App. 62a). As Judge Kravitch points out, in such a case

> there is no need to revisit the qualified immunity determination made by the prior appellate panel. This simple inquiry preserves the defendant's right to raise qualified immunity at trial while also safeguarding the interests of finality, judicial economy, and the superiority of appellate court rulings.

(*Id.*).

In this case, as the panel in the second appeal recognized, the facts presented on summary judgment became the "actual facts" at trial "without notable exception." Indeed, in those cases where the facts were different, they were more unfavorable to Petitioners and more favorable to Respondent than were the facts on summary judgment. While Judge Tjoflat in his dissent from the denial of rehearing *en banc* asserts that the facts were substantially different at the trial (*see* P. App. 30a), he does not set forth any such difference with specificity. Obviously the panel deciding the appeal disagreed with this unsupported conclusion. Indeed, Petitioners not only do not point to any such difference themselves in support of their Petition, but the published cases cited by Petitioners are inapposite on their facts. Therefore, it is evident that the application of the "law of the case" doctrine in this instance was proper and did not deny Petitioners a right to raise the defense of qualified immunity for a second time after trial. Therefore, the Court should not grant the Petition on this alleged ground.

CONCLUSION

As set forth above, the matters sought to be reviewed were correctly decided by the Eleventh Circuit. Moreover, granting the Petition would be useless as the Court could not reverse the judgment below because it was it was supported by grounds which are not challenged by this Petition. Therefore, for all of the foregoing reasons, the Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-8798

SANDRA D. RILEY,

Plaintiff-Appellee,

versus

LARUE T. CAMP, LORI WINKLER, fka LORI WEBB,

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTIONS(S) OF REHEARING EN BANC

Before: KRAVITCH and HATCHETT, Circuit Judges and ATKINS*, Senior District Judge.

PER CURIAM:
(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing

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* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

Appendix A

en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/ Joseph W. Hatchett
UNITED STATES CIRCUIT JUDGE